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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]66

THOMAS A. ALVAREZ,

*Petitioner,*

—v.—

STATE OF NEBRASKA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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In the

# Supreme Court of the United States

October Term, 1967

No. .....

Thomas A. Alvarez,

*Petitioner,*

—v.—

The State of Nebraska,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above-entitled case on December 8, 1967.

### Citations to Opinions Below

The judgment of death of the County Court of Lancaster County, State of Nebraska, made on March 31, 1967, is unreported. It is contained in the record at p. 19 and is printed in the Appendix, *infra,* pp. 29-30. The opinion of the Supreme Court of Nebraska is reported at 182 Neb. 358 (1967) and is set forth in the Appendix, *infra,* pp. 31-40.

## Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on December 8, 1967. Motion for Rehearing was denied on January 29, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

## Questions Presented

1. Whether the denial to petitioner of an opportunity to comment on and rebut by his own evidence prejudicial allegations contained in a presentence report put in evidence at the sentencing hearing by the trial judge, violates the due process clause of the Fourteenth Amendment?
2. Whether the imposition of the death penalty pursuant to Section 28-401, R. R. S. of Nebraska (1943), violates the due process clause of the Fourteenth Amendment because the statute is vague and lacks reasonably certain standards for decision?
3. Whether the imposition of the death penalty on petitioner pursuant to Section 28-401 inflicts loss of life without any compelling justification in violation of the due process clause of the Fourteenth Amendment?
4. Whether the sentence of death imposed on petitioner pursuant to Section 28-401 is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

## Statute Involved

Section 28-401, R. R. S. of Nebraska (1943):

> Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Corrections Complex during life. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, after the defendant has been fully informed of his constitutional rights, the punishment shall be fixed by the court.

## Statement of the Case

Petitioner, born in 1947, is a young man of Mexican-American ancestry. *State* v. *Alvarez,* 182 Neb. 358, 359 (1967), Appendix, *infra,* p. 31. A criminal proceeding brought by an information (R. 5), charged petitioner with premeditated murder, killing in the perpetration of a rape, and killing in the perpetration of a robbery (R. 5). Petitioner waived preliminary hearing and was bound over to the District Court of Lancaster County on September 29, 1966 (R. 10). On December 22, 1966, petitioner was arraigned on Count I and pleaded guilty (R. 17). The Court suspended further proceedings pending an investigation

by the adult probation officer (R. 17). On January 16, 1967, Counts II and III were dismissed (R. 18). In March, 1966, petitioner was given a psychiatric examination by a U. S. Navy physician who reported that although defendant was an "Emotionally Unstable Personality" he was "fully responsible for all his actions." *State* v. *Alvarez, supra,* at 361, Appendix, *infra,* p. 34. Two doctors for the defendant concluded jointly that he was temporarily insane, unable to tell the difference between right and wrong at the time of the alleged acts. *Id.* at 362-63, Appendix, *infra,* pp. 35-36.

The pre-sentence report contained a number of allegations prejudicial to petitioner including, but not limited to, a statement by a police sergeant that he believed petitioner guilty of a previous murder, Presentence Investigation Report, p. 31,[1] a statement by the five-year-old son of the deceased that defendant had entered the home uninvited (*id.* at 26, 27 [Petitioner consistently maintained that he had been invited in. See, e.g., Presentence Investigation Report, p. 105.]), and a statement by a police polygraph examiner that "It is definitely the opinion of this examiner that Thomas Alvarez was also responsible for other sex crimes at other places." Presentence Investigation Report, p. 24.

At the sentencing hearing, the trial court considered and placed into evidence on its own motion the 198-page presentence investigation report, which, apart from material submitted in petitioner's behalf, contained police records and investigation reports, defendant's statements, psy-

[1] A copy of the Presentence Investigation Report is part of the record filed with the Clerk of the Court. It is separately paginated.

chiatric reports, and statements about the petitioner by people who had known him. Petitioner was given no opportunity either to comment on the contents of the report or to offer his own evidence in rebuttal of the allegations which it contained. *State* v. *Alvarez, supra,* at 363, Appendix, *infra,* p. 36.

On March 31, 1967, the trial Judge sentenced petitioner to death without any statement of reasons (R. 19).

On automatic appeal to the Supreme Court of Nebraska, that Court concluded that the sentence was not "excessive" under Section 29-2308, R. R. S. of Nebraska (1943). The Court also rejected the arguments that the death penalty was a cruel and unusual punishment under the Eighth Amendment and was unnecessary in violation of the due process clause of the Fourteenth Amendment. 182 Neb. at 366, Appendix, *infra,* p. 39. The Court further held that the defendant had no state or federal constitutional right to review, rebut or comment on the contents of the pre-sentence report. *Id.,* at 363, Appendix, *infra,* p. 36. The Court did not deal explicitly with the argument presented by petitioner that Section 28-401 violated the due process clause of the Fourteenth Amendment because it was vague and lacked "rational guidelines" for decision. This point was re-raised in a motion for rehearing, together with the claim of cruel and unusual punishment under the Eighth and Fourteenth Amendments. The motion was denied on January 29, 1968.

## Reasons for Granting the Writ

Certiorari should be granted in this case because it involves substantial federal constitutional issues concerning the procedures by which a state may deprive a man of his life. While this case involves directly only one man, its implications affect the lives of over four hundred people now under sentence of death.

This Court has always given special attention to all issues presented in death cases because of the finality of the punishment. Here, where capital punishment itself, as well as its traditionally discretionary method of application, are under constitutional attack, plenary consideration is all the more appropriate.

This case presents four substantial contentions of constitutional law which should be determined by this Court.

## I.

**The sentence of death was imposed on petitioner in violation of the due process clause of the Fourteenth Amendment because petitioner was denied the opportunity to comment on and rebut by his own evidence prejudicial allegations which were contained in a pre-sentence report put in evidence by the trial judge on his own motion.**

In *Williams* v. *New York,* 337 U. S. 241 (1941), this Court rejected the argument that due process required the presentation of all evidence at a sentencing hearing by witnesses in open court subject to cross-examination. With respect to pre-sentence reports by probation workers, the Court said, *inter alia,* that, "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." 337 U. S. at 249-50.

Petitioner need not quarrel with the result in *Williams,* see Davis, 1 *Administrative Law* §7.16 (1958), to assert that the procedures used in sentencing him to death—compilation by the trial judge of a 198-page pre-sentence report that petitioner was not permitted to see prior to the sentencing hearing when it was received in evidence, and whose contents petitioner was given no opportunity to comment upon or to rebut—denied him the fundamental fairness required by due process. Indeed, the rejection by *Williams* of any right on the part of a defendant in a sentencing hearing to confront and cross-examine all persons giving information unfavorable to him lends added

importance to the very different right claimed here: the right merely to adequate notice of the contents of a pre-sentence report, and to some fair chance to comment on and attempt to refute by his own evidence allegations contained in a report which is received in evidence by the court as the basis for its decision whether he shall live or die.[3] The requirements of fair notice and of opportunity to explain and rebut, unlike a requirement of confrontation and cross-examination, do not effectively deny to the court any information, gathered by any investigative method, which the court may wish to consider. It does not even impose the burden of bringing into open court the witnesses on whose *ex parte* communications the court may choose to rest its life-or-death determination. It demands only that the defendant, with his life at stake, have some warning of, and a chance intelligently to rebut prejudicial allegations contained in the pre-sentence report. Petitioner contends that this is the minimal demand which due process imposes on capital sentencing.

While it is true that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of [criminal] trial procedure," *Williams* v. *New York, supra,* at 251, the mere fact that a proceeding involves sentencing should not shield it from the more flexible requirements of due process as they are ap-

[3] Petitioner was allowed to present material for inclusion in the pre-sentence report (Presentence Investigation Report, pp. 142-198), but at the time he was permitted to offer such material he did not and could not know of the prejudicial allegations contained in other material in the report, and he was given no opportunity to comment on or rebut those allegations when the report was entered in evidence at the sentencing hearing.

plied in administrative hearings.[3] See Davis, 1 *Administrative Law* §§7.02, 7.04 (1958), cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171-72 (1951) (Frankfurter, *J.*, concurring). Even in a sentencing procedure, the defendant has a right not to be acted against on the basis of inaccurate information. See *Townsend* v. *Burke*, 334 U. S. 736 (1948). But this right is illusory unless the defendant can know and challenge in some way the information on the basis of which the decision is to be made. See Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 826 n. 27 (1968).

The refusal to allow a defendant to see or contest information contained in a pre-sentence report has ordinarily been based for the most part on an alleged need for confidentiality to protect the continuing supply of information from secret informants. See, e.g., Roche, The Position for Confidentiality of the Pre-sentence Investigation Report, 29 Albany L. Rev. 206, 212 (1965). The rule of complete confidentiality has recently been the subject of much criticism.[4] But on the record of the present case, the policy of protecting the confidentiality of secret sources was not invoked. The pre-sentence report was fully disclosed by the court itself, apparently in order to allow the Supreme Court of Nebraska to consider the information it contained upon its automatic review of the case. Petitioner, however,

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[3] Even in *Williams* itself, the Court indicated that sentencing was not "immune from scrutiny under the due process clause." 337 U. S. at 252 n. 18.

[4] See, e.g., Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 835-41 (1968); Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257, 277-78 (1952); Model Penal Code §7.07(5) (Proposed Official Draft 1962); Higgins, Confidentiality of Pre-sentence Reports, 28 Albany L. Rev. 12, 32-33 (1964).

was given no opportunity to comment on or contest its allegations.

The only possible justification for such a procedure is concern about time-consuming proliferation of minor issues. But this problem could easily be controlled through reasonable limitations on presentations by defense counsel, see Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 841 (1968); and in any event, in a capital case, the concern is an inadequate justification for the substantial prejudice to defendants likely to result from denial of fair notice and opportunity to rebut unfavorable information.

The danger of prejudice implicit in a system of denying defendants the chance to contest allegations against them in pre-sentence reports is made palpable in the present case. The pre-sentence report here included three assailable and exceedingly prejudicial statements. The first was the written report of a Lincoln, Nebraska police detective who related a telephone conversation he had had with one Sergeant Montoya of the Denver police department. Presentence Investigation Report, p. 31. Sergeant Montoya had said that his department had arrested petitioner on August 19, 1966, for investigation in the apparent murder of a Denise Bargas in Denver. The sergeant continued that he felt "definitely in his own mind" that petitioner was responsible for the killing and that he "definitely" knew that petitioner had to be at the address when the murder took place, but that he "could not prove any of this." *Ibid.* In short, Sergeant Montoya accused petitioner of a prior murder even though the investigation of his relationship to the crime had been dropped. It is significant that even the Supreme Court of Nebraska relied upon petitioner's

supposed involvement in the Bargas murder as an aggravating circumstance supporting the imposition of the death penalty upon him. 182 Neb. at 360; App., *infra*, p. 33.

Another prejudicial statement was that of the five-year-old son of the deceased, recorded in the police reports, that petitioner had entered the deceased's home uninvited. (See Pre-sentence Investigation Report, pp. 26, 27, and an unnumbered page between pages 42 and 43.) This story was directly contrary to petitioner's version of the events. See *State* v. *Alvarez, supra,* at 359; App., *infra,* p. 32. Petitioner maintained that he had been invited in, but—for want of adequate notice of the issue—developed no evidential support beyond his own professions to this effect.

The third prejudicial statement which petitioner had no opportunity to rebut was that of a police polygraph examiner that ". . . Alvarez was also responsible for other sex crimes at other places." Presentence Investigation Report, p. 24.

These statements involved grave and obvious prejudice to the defendant. We submit that the question is substantial whether a procedure is constitutional that allows the sentence of death to be based on such statements, without the slightest opportunity for rebuttal.

## II.

**The sentence of death imposed on petitioner pursuant to section 28-401 violates the due process clause of the Fourteenth Amendment because it is vague and lacks reasonably certain standards for decision.**

Whatever else due process of law may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned a degree of vagueness in criminal statutes which allow the fact-finder to create its own standard in each case. See, e.g., *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926). See also *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth they leave for arbitrariness and suasion by impermissible considerations. See *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965); *Lewis, The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 110, including racial considerations, see *Louisiana* v. *United States*, 380 U. S. 145 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and every other insidious urging of caprice or prejudice.

The dangers implicit in unbridled discretion in imposing punishment are illustrated in the grim history of the dis-

criminatory use of the death penalty in the United States. Of those convicted of intentional homicide only about one per cent are executed.[5] This one per cent is almost universally poor and friendless.[6] Even if judges and juries do not intentionally favor the rich, the wealthy men can afford to pay for a superior presentation of his case.

Negroes, Puerto Ricans, and Mexican-Americans convicted of capital crimes are more often sentenced to death than whites. In New York State, for example, 85 per cent of those sentenced to death were Negroes. See Dorsen, "The Death Penalty—A Civil Liberties Issue?", Civil Liberties (No. 221, December, 1964). Negroes sentenced to death are more likely to be executed than whites. See Wolfgang, Kelly, and Nolde, "Executions and Commutations in Pennsylvania," in Bedau, *The Death Penalty in America,* 466, 473-77 (1964). Thus it is not completely by chance that this defendant is of Mexican-American descent.

Under "vagueness" decisions cited above, it could scarcely be contended that a statute would be valid which provided: "Whoever is found condemnable in the discretion of a judge shall be guilty of an offense." Yet a parallel standard has been found an acceptable basis for a judicial decision of "death" for petitioner rather than "life" by the Nebraska Supreme Court. Section 28-401, R. R. S. of Nebraska (1943), provides in part,

> "upon a plea of guilty, after the defendant has been fully informed of his constitutional rights, the punishment shall be fixed by the court."

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[5] Berman, "Capital Punishment Is on the Way Out," The Progressive, Apr. 1, 1960.

[6] See, e.g., Johnson, "Executions and Commutations in North Carolina" in Bedau, *The Death Penalty in America,* 452, 459-61 (1964).

The trial court has no guides or standards; it need give no specific reasons for its decision and it did not do so in this case (R. 19). On appeal, which is automatic after a sentence of death [R. R. S. §29-2306.01 (1943)],

> "... the Supreme Court ... may reduce the sentence rendered by the district court against the accused, when in the opinion of the court the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence ..." R. R. S. §2308 (1943).

The decision on appeal is merely a repetition of the trial court's unconfined and undefined sentencing discretion. Many possible factors are potentially relevant, yet the final decision ultimately being uncontrolled except by the individual consciences of the members of the court. See *State* v. *Alvarez, supra,* Appendix, pp. 31-40, *infra.* Compare, e.g., *Hamblin* v. *State,* 81 Neb. 148, 115 N. W. 850 (1908); *Muzik* v. *State,* 99 Neb. 496, 156 N. W. 1056 (1916); *Cryderman* v. *State,* 101 Neb. 85, 161 N. W. 1045 (1917); *Swartz* v. *State,* 118 Neb. 591, 225 N. W. 766 (1929); *State* v. *Hall,* 176 Neb. 295, 125 N. W. 2d 918 (1964).

Procedures like Nebraska's are justified on the theory that standards are not necessary in the sentencing process because no issue of fair warning to potential defendants is involved. But in *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966), this Court squarely held what its earlier decisions had plainly implied, see *Note,* 109 U. Pa. L. Rev. 78, 80-85 (1960): that the concern of the due process clause for fundamental regularity in the process of judicial decision-making—for the rule of law, rather than the arbitrariness

of unprincipled *ad hoc* judgment—is not confined to situations in which arbitrariness may *also* present the problem of fair warning. Plainly, an initial finding of guilt is an inadequate basis for exempting all further decision-making proceedings from the requirement of procedural regularity imposed by rational standards, and for exposing defendants to the whims and prejudices of judges and juries. *Giaccio* teaches that sanctioning, like all other judicial processes bound by the Due Process Clause, must conform to the principle of governance by rules of law, not men. And more is at stake in a sentencing choice between life and death than in the assessment of costs in a minor misdemeanor matter like *Giaccio*.

In fact, the present lack of reasonable standards and other procedural due process protections for defendants at sentencing has been tolerated because of a fortuitous combination of historical circumstances. In the Eighteenth Century, the defendant would not have been aided by procedural protections at sentencing, because the penalty for a crime was usually fixed inflexibly by common law or statute. See Note, "Procedural Due Process at Judicial Sentencing for Felony," 81 Harv. L. Rev. 821 (1968). Pardon was the only way of obtaining mitigation of sentence. Thus when individualization of sentence became possible with statutory changes in the nineteenth century, "[c]ourts . . . may well have continued to take the view that the prisoner was still asking for mercy rather than 'justice' . . . that the primary burden of the role formerly charged by the executive had now shifted to the judges." *Id.* at 822-23.

Later in the nineteenth century the "new" penology began to develop corrections theories which called for the individualization of punishment based on the opinions of

experts as to the need of the defendant for specialized "treatment." With this change of theory, however, procedural due process requirements continued to be ignored on the grounds that they would interfere with the use of scientific opinion and that they would make sentencing an unduly burdensome procedure. See, e.g., *Williams* v. *New York, supra,* at 250-51.

Substantial doubt, however, has been thrown on the traditional needlessness of due process requirements at the sentencing stage by three cases decided by this Court within the past year. In *Mempa* v. *Rhay,* 389 U. S. 128 (1967), *In Re Gault,* 387 U. S. 1 (1967), and *Specht* v. *Patterson,* 386 U. S. 605 (1967), this Court applied to areas previously marked by unfettered judicial discretion the principle that procedural protections for defendants must be afforded commensurately with the extent to which the defendant's interests are realistically affected at any stage of the criminal process.

In *Mempa* v. *Rhay, supra,* the Court explicitly recognized "the critical nature of sentencing in a criminal case"; 389 U. S. at 134, and made provision of counsel mandatory at that stage, even if it is delayed by provisional release. 389 U. S. at 137. But to guarantee the defendant counsel at a sentencing procedure without requiring that the sentencing decision be based on intelligible principles may provide the defendant with an illusory right. While a lawyer can be of significant use to the defendant in challenging those facts which he is permitted to know, see *Williams* v. *New York, supra,* and Point I, *supra,* and in preserving various procedural rights, see *Mempa* v. *Rhay, supra,* the lawyer cannot provide his most important service—effective argument to a court for an appropriate disposition on the

basis of neutral principles—unless there are intelligible standards, known to both judge and lawyer, by which the decision is to be made. Without the possibility of argument from and to neutral principles, it is hard to call a decision-making process a legal one at all.

Just as significant as *Mempa* is the *Gault* case in which this Court applied the requirements of procedural due process to juvenile court proceedings, which had previously been left uncontrolled in order, *inter alia,* to maximize the use of discretionary, but expert decision-making. See also *Kent* v. *United States,* 383 U. S. 541 (1966). Citing evidence of the failure of juvenile courts to live up to their "scientific" goals, 387 U. S. at 18 *et seq.,* this Court imposed upon them the basic elements of a due process hearing. 387 U. S. at 31-59. Authoritative evidence now indicates that sentencing courts across the country have failed as badly as the juvenile courts. The history of discretionary sentencing, like juvenile court history, "has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U. S. at 18. The Task Force Report on The Courts of the President's Commission on Law Enforcement and Administration of Justice (1967) concluded (at p. 23) that "[t]he existence of unjustified disparity [in sentencing] has been amply demonstrated by many studies.[7] It is a pervasive problem in almost all jurisdictions." The

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[7] The Report cites Bennett, Countdown for Judicial Sentencing, Fed. Prob. Sept. 1961, pp. 22, 26; Youngdahl, Remarks Opening the Sentencing Institute Program, 35 F. R. D. 387, 390-91 (1964); Van Dusen, Trends in Sentencing Since 1957 and Areas of Substantial Agreement and Disagreement in Sentencing Principles, *id.,* at 395 (1964).

Task Force Report recommended "enactment of criteria for sentencing" and educational programs for judges. *Id.* at 24.

The gross injustice which the President's Commission found at all levels of sentencing is peculiarly intolerable when it infects the application of the death penalty. Even if the imprecision of the sentencing art and complexity of sentencing goals must allow for some degree of judicial discretion in deciding between different fines or terms of years, the degree of arbitrariness allowed a State is not so liberal where grave and irremedial punitive exactions are at stake, see *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), and none is graver or more irremediable than the sentence of death.

Moreover, the decision to impose the death penalty is more than a choice among divers instruments of correctional policy whose common, if individualized, objective is to treat the offender in a fitting fashion with a view to rehabilitation, incapacitation and deterrence. The decision to impose the death penalty withdraws a defendant from this ordinary sentencing regime, and subjects him to another, cf. *Specht* v. *Patterson, supra,* whose goals (assuming them to be rational at all) eschew rehabilitation, incapacitate beyond any arguable need for incapacitation, and focus exclusively on the limited deterrent concern of treating the defendant as an object, to be killed "pour decourager les autres." Concededly, the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance. But to concede the complexity of sentencing goals is no reason to sustain the Nebraska procedure which is not tied by reasonable standards to their fulfillment.[8] Inevitably under such a sentencing

[8] We need not take the stand in this case, of course, that the due process clause entirely forbids the exercise of discretion in sentenc-

regime, capital punishment in the few, arbitrarily selected cases where it is applied is both unjustifiable and lawless. The question of its constitutionality under the due process clause, we submit, is substantial.

## III.

**Imposition of the death penalty pursuant to section 28-401 inflicts loss of life without any compelling justification in violation of the due process clause of the Fourteenth Amendment.**

Life is a fundamental right. Jefferson considered this proposition self-evident. "Life" heads his list of "inalienable" rights; it also heads the list of enumerated rights in the Fifth Amendment to the United States Constitution. Indeed, characterizing the right to life as "fundamental" verges on grotesque understatement. Existence is a prerequisite to the exercise of any rights.

When the state attempts to extinguish the right to exist it imposes a burden or a restriction on the exercise of that right. Again, conventional constitutional expression is woefully inadequate. If the greater ever included the lesser, exterminating life "restricts" its exercise.

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ing even in a capital case. Ways may be found to delimit and guide discretion and narrow its scope; and these may bring a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada, which makes certain reviewable findings of fact the indispensable condition of imposing capital punishment, see Nev. Rev. Stat. 200.360 (1963); or that of the Model Penal Code, which both establishes prerequisite findings and enumerates aggravating and mitigating circumstances, see American Law Institute, Model Penal Code, 210.6 (P. O. D. May 4, 1962) pp. 128-132, is not the question presented here.

When the state attempts to restrict a fundamental personal right it can do so only on the showing of a "compelling interest". *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963); *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1950); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 644 (1943); *Griswold* v. *Connecticut,* 381 U. S. 479, 497 (Goldberg, *J.,* concurring) (1965). In order to satisfy the requirement of "compelling interest" the state must demonstrate each of the following: (1) That the restriction imposed rationally relates to legitimate governmental objectives sought; (2) that the benefit to the public outweighs the impairment of the constitutional right and that (3) no alternative means less subversive of the constitutional right are available. See *Griswold* v. *Connecticut, supra,* at 497 (Goldberg, *J.,* concurring); *N. A. A. C. P.* v. *Alabama,* 377 U. S. 288, 307-08 (1964); *Sherbert* v. *Verner, supra* at 407; *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Schneider* v. *State,* 308 U. S. 147, 161 (1939).

The State's "interest" in the death penalty is the punishment of criminal offenders, under which four possible legislative ends are subsumed. They are: (1) vengeance; (2) rehabilitation; (3) incapacitation and (4) deterrence. Vengeance is not a legitimate legislative purpose. It is by nature irrational and if it were countenanced as an objective it would justify all cruel and unusual punishments, which are unconstitutional under the Eighth and Fourteenth Amendments. See Point IV, *infra.* The death penalty obviously has nothing to do with rehabilitation, except to render it impossible. Capital punishment does serve the goal of incapacitation, of course—and drastically. But this purpose can be served equally effectively by life imprison-

ment, which is obviously less subversive of the constitutional rights of defendants.[9]

This leaves deterrence as the remaining possible legitimating purpose of the extreme penalty. But statistical studies have established beyond question that capital punishment is not a more effective deterrent than life imprisonment. The most authoritative studies in the area have been done by Professor Thorsten Sellin. *Sellin, The Death Penalty* (Philadelphia, The American Law Institute, 1959). Comparing socially and economically similar States having capital punishment and lacking it, he found that their trends in homicide rates were indistinguishable. He made similar findings for periods before and after abolition in States which had abolished the death penalty. A special study of homicides of municipal policemen found no significant difference between abolitionist states and others. Accord: Graves, "The Deterrent Effect of Capital Punishment in California," in Bedau, *The Death Penalty in America,* 332 (1964). See the recent authoritative international studies: United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9) (1962); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) (1967); President's Commission on Law

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[9] Life imprisonment is said by some to be less satisfactory than capital punishment because it is more expensive. This calculus is unproved and may be doubted in view of the legal expenses which normally accompany the imposition of the death penalty. See MacNamara, "Statement Against Capital Punishment," in Bedau, *The Death Penalty in America,* 182, 192-93 (1964). But even if the expense allegation is true it hardly represents a "compelling" state interest justifying the taking of human life. See *Sherbert* v. *Verner, supra,* at 406-07.

Enforcement and the Administration of Justice, Task Force Report: The Courts 27 (1967).[10]

If the death penalty has not been shown to deter in general, the deterrence claim is certainly no stronger in the State of Nebraska, where a total of four persons have been executed since 1930 out of the many convicted of crimes potentially carrying the death penalty. In Nebraska capital punishment serves no significant purpose at all; it is not an integral part of the law enforcement process; it is simply an irregular, aberrant and draconic hyper-penalty imposed once in ten years on some haphazardly chosen individual.

## IV.

**The sentence of death imposed on defendant pursuant to section 28-401 constitutes a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.**

The phrase "cruel and unusual punishment" has never been free from ambiguity. It was initially intended to outlaw the gross tortures sometimes imposed in Stuart England. Gottlieb, "Testing the Death Penalty," 34 S. Cal. Law Rev. 268, 281 (1961). But this Court has made clear that the phrase is to be viewed in the light of "the

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[10] The Justice Department has taken the position that the death penalty fails to serve social interests better than other punishments. This position was stated by then Deputy Attorney General Ramsey Clark, in a letter to the Honorable John L. McMillen, Chairman, District of Columbia Committee, House of Representatives:

> "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals." *The New York Times*, July 24, 1965, at 1, col. 5.

evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion of Mr. Chief Justice Warren). As Mr. Justice McKenna stated for the Court in *Weems* v. *United States,* 217 U. S. 349, 373 (1910):

> "Time works changes, brings into existence new conditions and principles. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephermeral enactments, designed to meet passing occasions. They are to use the words of Chief Justice Marshall, 'Designed to approach immortality as nearly as human institutions can approach it.'"

The question of what punishments violate our "evolving standards of decency" is a difficult one, but some considerations are clearly relevant to the answer. First, cruelty in the constitutional sense is not limited to the infliction of physical pain. In *Trop* v. *Dulles, supra,* this Court held that loss of citizenship was a cruel and unusual punishment because, *inter alia,* "[i]t subjects the individual to a fate of ever increasing fear and distress." 356 U. S. at 102. Whether or not the execution would be carried out in a physically painful manner in this case, there is no doubt that condemned men and women suffer immense mental torture. See, e.g., Ranson, *I Want to Live* (1958). The average period between sentence and execution was 26.8 months in 1964. See Gottlieb, Capital Punishment: The Legal Challenge, ACLU Open Forum, 4-5 (Feb. 1966). This period cannot be described as other than one of "ever increasing fear and distress." 356 U. S. at 102. Ultimately, of course, deprivation of life is a penalty whose

cruelty uniquely cannot be measured solely in terms of the victim's sensations. Capital punishment is not only inherently brutal to its victims, but brutalizing to its inflictors.

Second, the discussion under Point III, *supra,* with respect to the need for capital punishment is critically relevant to deciding whether it is cruel and unusual. Lack of justification or necessity for the infliction of suffering is an integral part of the definition of cruelty.[11]

Perhaps the most important indication of its cruelty is the contemporary disuse of the death penalty in the United States.[12] Over the last four decades capital punishment has progressively ceased to become a regular part of the American system of criminal justice. Although a significant number of individuals are sentenced to death, the number of actual executions per year has declined dramatically from over one-hundred-and-fifty a year in the thirties to only one in 1966 and two in 1967:[13]

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[11] "Cruelty: 1. Quality or state of being cruel, disposition to inflict or enjoy unnecessary pain or suffering; inhumanity . . . . Webster, *New International Dictionary* 636 (unabr. 2d ed., 1954).

[12] In *Trop* v. *Dulles, supra,* the Court also looked to the practices of the other nations to help define cruelty. 356 U. S. at 102-03. In this case we note that the death penalty has been abolished in almost all of the countries of Western Europe, including Great Britain, Denmark, Finland, Italy, Monaco, Norway, Netherlands, Portugal, San Marino, Sweden, Switzerland, and West Germany. See United Nations Department of Economics and Social Affairs, Capital Punishment, Document ST/SDA/9. Monaco was added to the list in 1964. *New York Times,* June 20, 1964, at 2, col. 3.

[13] U. S. Department of Justice, *National Prisoner Statistics,* No. 39 "Executions 1930-1965" (1966); *Time,* July 7, 1967, at p. 47 (1966); New York Committee to Abolish Capital Punishment, Special News Report, Jan., 1964, at p. 2 (1967). Thirteen states have entirely or substantially eliminated the death penalty: Michi-

| *Year* | *Amount* |
|---|---|
| 1930-1934 | 776 |
| 1935-1939 | 890 |
| 1940-1944 | 645 |
| 1945-1949 | 639 |
| 1950-1954 | 413 |
| 1955 | 76 |
| 1956 | 65 |
| 1957 | 65 |
| 1958 | 49 |
| 1959 | 49 |
| 1960 | 56 |
| 1961 | 42 |
| 1962 | 47 |
| 1963 | 21 |
| 1964 | 15 |
| 1965 | 7 |
| 1966 | 1 |
| 1967 | 2 |

As noted above, in Nebraska itself, only four persons have been executed since 1930.

The long-standing disuse of the death penalty in Nebraska and its increasing disuse in the rest of the country raise sharply the relationship between the words "cruel" and "unusual." The phrase has sometimes been interpreted to mean either cruel or unusual. See *Weems* v. *United States*, 217 U. S. 349, 401 (White, *J.*, dissenting) (1910). By this

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gan, Rhode Island, Wisconsin, Maine, Minnesota, North Dakota, Alaska, Hawaii, Oregon, Iowa, West Virginia, Vermont, and New York, American Civil Liberties Union, Memorandum on Capital Punishment 2 (Feb. 1967). In several other states executions have been rare over the last thirty years, Bedau, *supra*, at 31.

standard, capital punishment is clearly an "unusual" punishment today in the United States. But even if the words are taken together, the unusualness of a punishment is surely important evidence of its cruelty, for cruelty inheres in a procedure in which a very few, fortuitously selected individuals are arbitrarily given different treatment than others in a similar position.

This consideration, in turn, suggests the intimate relation between the constitutional concept of cruel and unusual punishment and the vagaries inherent in the unsystematic and irregular procedure for choosing men to die, complained of in Point II, *supra*. Even assuming *arguendo* that the death penalty is not *per se* a cruel and unusual punishment, it is one as it is applied under Nebraska's procedure. A judgment of death under the Nebraska system of discretion by the trial and Supreme Courts is cruel and unusual because, imposed without standards, it is erratic, lacking a structured relationship to any alleged social purpose.

Any death inflicted in such an absence of standards is fundamentally and irremediably whimsical, however conscientious the efforts made to be fair; it is cruel and unusual not only because it is extreme, but also because it is wanton in its extremity.

## CONCLUSION

**For the reasons set forth above, certiorari should be granted.**

Respectfully submitted,

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April 1968

# APPENDIX

## Journal Entry

That on the 31st day of March, 1967 (that being the 50th Judicial Day of the January 1967 term of said court) were had and done the following proceedings as appear upon Court Journal "325" at Page ——, Honorable Bartlett E. Boyles, Judge to-wit:

24-123 INFORMATION FOR MURDER IN THE FIRST DEGREE

THE STATE OF NEBRASKA,

—VS.—

THOMAS A. ALVAREZ.

Now on this day comes the County Attorney, Paul L. Douglas, on behalf of the State of Nebraska, and the defendant being present in court with his counsel, T. Clement Gaughan, this matter now comes on for sentencing, and standing at the bar of this court in open court, the defendant is duly inquired of by the Court if he has anything to say as to why sentence should not now be pronounced, and the defendant stated that he was sorry.

The Court finds no sufficient reason for withholding sentence.

Defendant's attorney makes a statement to the Court.

It is therefore considered, ordered and adjudged by the Court that the defendant be transported to the Nebraska Penal & Correctional Complex at Lincoln, in Lancaster County, forthwith and that between the hours of 6:00 A.M. and 6:00 o'clock P.M., on the 20th day of July, 1967 he be put to death in the manner provided by law, and that he pay the costs of this prosecution taxed at $———.

The Clerk of this Court is hereby directed to forthwith prepare and file with the Clerk of the Supreme Court a transcript of all proceedings herein as required by law.

## Opinion of the Supreme Court of Nebraska

Filed December 8, 1967. No. 36637.

STATE OF NEBRASKA,

*Appellee,*

—v.—

THOMAS A. ALVAREZ,

*Appellant.*

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

CARTER, J.

This is an appeal from the assessment of the death penalty in a first degree murder conviction after a plea of guilty.

The defendant was a young, single man of Mexican origin of the age of 19 years. He was a strong, able-bodied man, very interested in sports with a special interest in boxing. On September 14, 1966, he was employed by Lincoln Landscaping, Ltd., and was assigned to the doing of yardwork at the Rohman home immediately north

of the home of Mary O'Shea, the victim of the murder. The record shows that the defendant entered the O'Shea home, physically assaulted Mrs. O'Shea, raped her while she was in an unconscious condition, and, when she showed signs of regaining consciousness, strangled her with a cord which he cut from a window drape, took some valuable rings from her finger, left the scene, and was arrested by the police while on his way to the bus station to take a bus to Denver, Colorado.

The defendant states in his confession that he was trimming trees in the Rohman yard when Mrs. O'Shea returned from transporting one of her children to school after the noon hour. He says that she invited him into the house for a cup of coffee and began to visit with him about his girl friends. Without any provocation on his part, he says, she began screaming "rape" and threatened to call the police. He struck her several times, reduced her to a state of unconsciousness, removed her clothing, raped her, and strangled her to death as previously related. The evidence further shows that John O'Shea, age 5, and a little girl, Abbie Druliner, accompanied Mrs. O'Shea when she took her older son to school and returned with her. John stated that when the three of them entered the home, the defendant was hiding near the refrigerator and he jumped out, grabbed his mother, began choking her, and knocked her to the floor. In view of the subsequent events, the statements of the defendant that Mrs. O'Shea brought sex into the conversation and made advances into this area is wholly unworthy of belief. This conclusion is supported by statements in the report of Dr. Charles A. Rymer, a psychiatrist, which were given him by the defendant, as follows: He has had sexual relations with many girls continuously since age 13, he is the father of a 3-month-old

son, presently has two girls pregnant in Denver, Colorado, and has been recently suspected of murdering a young girl working as a babysitter in Denver and released for lack of proof. We have been unable to find any mitigating circumstances for the murder in the facts establishing the murder itself.

The main contentions of the defendant in support of a reduction of his sentence of death to life imprisonment are the poor environment in which he was raised and an assertion of psychiatric condition resulting in a decompensation of his mental faculties.

The record shows that the defendant was an illegitimate child. His mother has been married three times and the defendant was unable to get along with any of his stepfathers, and lived with his maternal grandmother in his early youth. He attended school until the middle of the 12th grade when he dropped out of school. In some subjects he did quite well; in most he was a poor student. His school records show on one report that he missed 30 days of school. He was a mild mannered young man most of the time, but at times was not. He seemed to have developed a tendency to engage in fighting with little or no provocation. He was arrested many times for minor offenses. He resented any form of discipline, and restrictions imposed on him, by law or otherwise, were an anathema to him. Out of this grew a belief by some that he was abnormal and was a fit subject for psychiatric treatment. Several psychiatric physicians have examined him since the murder on September 14, 1966, with varying results. There is evidence submitted that while he was serving in the Navy before the murder, his conduct was such that he was subject to psychiatric examination. There is evidence in the record that he attempted suicide on three occasions.

These matters were all considered in evaluating his psychiatric condition. A brief review of these evaluations seems necessary.

In March 1966, defendant was given a psychiatric evaluation by a United States Navy physician, the report of which contains the following: "Emotionally Unstable Personality with strong antisocial tendencies as manifested by fluctuating moods, suicidal gestures to get out of an undesirable situation, inability to tolerate restrictions, inability to postpone gratification of immediate desires and apparent inability to profit from experience or punishment. * * * There is no indication for psychiatric treatment or hospitalization. It is also noted that he is fully responsible for all his actions and that any future acting out should be considered a misconduct and treated as such." David Levine, Ph.D., Professor of Psychology, evaluated the defendant and stated in part in his report: "On the basis of this evaluation, it is my judgment that he is mentally competent to assist in his defense and that he understood the nature and consequences of his behavior at the time of the crime. * * * He is not mentally retarded and there are no signs or organic brain damage. * * * My own approach to these scores on the MMPI [Minnesota Multiphasic Personality Inventory] (that is, a very high Schizophrenic Score and a very high faking score) is to look at other tests for corroborating evidence. I gave Alvarez the Rorschach, the Sentence Completion, and the Wechsler Bellevue, Form II, and could find no evidence which would lead me to consider his high schizophrenic score on the MMPI valid. The most reasonable conclusion is that he was faking on this test. His responses to the Rorschach were quick (a reflection of his impulsivity, I believe), but they were realistic, conventional, and almost

stereotyped." Dr. Charles A. Rymer, a psychiatric physician, evaluated the defendant's mentality. In his report, he says in part: "The mental examination reveals no deviation which might be considered as representing any type of psychosis. His intellectual rating is that of a dull normal. As to the details of his crime it would be my impression that he is well aware of the fact that he did kill his victim and that he did rape her. The story as related by him appears to be logical and coherent, although the details may vary in some degree. As a result of this examination it is my opinion that Mr. Alvarez is mentally competent, that he knows the difference between right and wrong, and he knows that he committed a murder. It is my opinion, based upon the history, that he has been accountable in the past for his behavior and was accountable for his behavior on September 14, 1966."

The defendant was examined on behalf of the defendant by Nathan Greenbaum, Ph.D., and Dr. Stanton L. Rosenberg, psychiatrist, who filed a joint report of their evaluation of the defendant. We summarize their report by quoting the following from it: "Indeed, we can understand this entire episode as a form of temporary insanity, during which he was not in command of his mental faculties, did not and could not know the nature of the act, and was not capable of knowing that what he was doing was wrong. As indicated in our preliminary report of December 2, 1966, while he is capable in retrospect of acknowledging the wrongness of his act and the concomitant remorse, he was not capable at the time of commission of the act, by virtue of his temporary insanity, to determine right versus wrong or to act in consonance with any such knowledge of right versus wrong." The report shows that the history affording the basis for its conclu-

sion was obtained from the defendant, his mother, and previous records. The statement of facts contains much that does not appear in any of the statements given to other psychologists and psychiatrists. It is odd, indeed, that much of the historical evidence was not revealed to other psychiatrists who examined the defendant. It is apparent that defendant, at the time of this examination, was able to recall more self-serving facts as to his mental condition previous to the murder than he had been able to do at previous psychiatric examinations.

We here call attention to the fact that the defendant entered his plea of guilty after consulting with his legal counsel. There was no trial. After the acceptance of the plea, the sentencing of the defendant was delayed until a thorough presentence investigation could be made. Police investigation reports, statements, confessions, character references, and reports of psychiatrists and psychologists were accumulated and submitted to the trial court. Opportunity to cross-examine witnesses or to comment on the contents of the presentence investigation was neither required nor afforded. The sentencing court evidently examined the 198-page report and available exhibits and came to the conclusion that the case was one calling for the assessment of the death penalty. A careful review of this lengthy investigation report does not indicate that the trial court failed to exercise the responsibility lodged in it by section 28-401, R. R. S. 1943.

The defendant asks this court to reduce the sentence from death to life imprisonment under the authority of section 29-2308, R. R. S. 1943, which provides in part: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may

reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence." We point out that this statute does not authorize this court to reduce criminal sentences as a matter of grace, but, on the contrary, such sentences may be reduced only when they are found to be excessive. The issue is a judicial one and not one that may be exercised at will.

It is first contended the defendant, in entering a plea of guilty, saved a trial and the costs thereof, and that he is entitled to some compensation in the form of mitigation of punishment. That a plea of guilty sometimes warrants a reduction of the degree of a crime or the term of the sentence to be imposed is undoubtedly true. But a court is not bound to mitigate the punishment when the circumstances do not justify it. If such a mandatory rule existed, every person guilty of crime could avoid the maximum penalty by simply pleading guilty. The motivation for the guilty plea in this case is not known to us. We hazard a guess that defendant reasoned that he had a better chance for a life sentence with the court by pleading guilty than he would have after a verdict of guilty by a jury. But in any event, the trial court may or may not give consideration to a guilty plea, dependent on the circumstances of the case. Defendant contends that he cooperated fully with the police. This appears to be true after he found out they had evidence of his guilt. Before that, however, he denied the crime or any connection with it. Here again the trial court may consider the fact of cooperation with law enforcement officers, but it is not bound to do so. It is also urged that the trial court abused its discretion in

sentencing the defendant to death when such penalty was not demanded by the prosecution. There may be many reasons or none at all why the prosecuting attorney does not demand the death penalty. The sentence rests with the trial court and the failure of the prosecutor to demand the death penalty in no manner limits the responsibility of the trial court to fix the sentence in accordance with the law and the evidence.

Defendant contends that his emotional and mental instability, as shown by the presentence investigation, requires a reduction of the sentence to life imprisonment. We point out that the commission of every crime of the nature here shown indicates a degree of abnormality. The commission of a brutal killing, without provocation, of a woman unknown to the defendant necessarily shows some emotional instability. The differentiation of this type of mental decompensation with that indicating mental irresponsibility for crime involves a close examination of the facts. The viciousness of the crime is enough for some to establish sufficient mental instability to justify a reduction of sentence. But the very viciousness and brutality of the crime does not of itself give rise to judicial leniency.

There is much said about three alleged suicidal attempts, but they do not indicate serious attempts by the defendant to take his own life. They do indicate that they were "suicidal gestures to get out of an undesirable situation," as found by at least one of the examining psychiatrists. It is [illegible] the fact that multiple killings were not involved as a matter for consideration and the cases of Starkweather v. State, [illegible] Neb. 477, 93 N. W. 2d 619, and Sherman v. State, 118 Neb. 84, 223 N. W. 645, are noteworthy examples. But the imposition of the death sen-

tence is not applicable only to multiple killings. Such a sentence may be imposed in a single killing where the crime was so gruesome and vicious, and the defendant so depraved in character as to authorize a death sentence. The case is controlled by Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, and MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, 323 U. S. 804, 65 S. Ct. 559, 89 L. Ed. 642. In the last-cited case, we said: "The crime here committed is so gruesome and depraved in character that a reduction of the sentence prescribed by the jury and imposed by the trial court would amount to a holding that capital punishment will never be enforced in this state, irrespective of the legislative enactments on the subject." The quotation has application to the case before us.

It is argued here that the death penalty is a relic of an uncivilized past, that it is now, in our modern society, a cruel and unusual punishment, that it has no deterrent effect, that public opinion is opposed to it, and that the death penalty is not necessary. These contentions will be briefly commented upon. The death penalty by electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions. In re Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519; Malloy v. South Carolina, 237 U. S. 180, 35 S. Ct. 507, 59 L. Ed. 905. That such punishment is the relic of an uncivilized past is purely a matter of opinion. The assertion that capital punishment has no deterrent effect is an unsupported claim. No one can know the extent of the deterrent effect of such punishment. In any event, the fixing of the minimum and maximum punishment for crime is a legislative function with which this court is powerless to interfere. This court has attempted over the years to maintain a consistent application of the

act. The repugnance that some individuals may feel toward capital punishment must be put aside in obedience to the law of the state. The views of the public as shown by statistics purporting to support them are of no avail in the determination of questions of law. It is urged here that it is not necessary to impose the death penalty in the instant case. The trial court determined that it was and this court finds adequate support for that finding in the evidence. The legislative act providing for the death penalty clearly indicates that the death penalty was to be imposed in certain cases, otherwise such penalty would not have been provided for in the statute. The interpretations of the statute by this court sustain the judgment of the trial court. The decision of the trial court involves a most serious responsibility and a great deal of soul-searching. The trial judge, in imposing the death sentence as being required by the law of this state, evidences the integrity in the enforcement of the law that his oath of office imposed upon him. We are unable to find any reason for interfering with the judgment of the trial court under the evidence presented.

The judgment of the district court is in all respects affirmed and Friday, March 22, 1968, between the hours of 6 o'clock a.m., and 6 o'clock p.m., of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

PREME COURT, U. S.

FILED
JUL 25 1968
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1968

No. 66

THOMAS A. ALVAREZ, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

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## OPINIONS BELOW, JURISDICTION, AND QUESTIONS PRESENTED

Respondent accepts petitioner's Citations to Opinions Below, Jurisdiction, and Questions Presented.

## STATUTES AND RULES INVOLVED

Section 29-2215, R. R. S. Nebraska, 1943:

> "Every probation officer, when so directed by the court in which he is serving, shall inquire into the antecedents, character and circumstances of any person or persons accused within the jurisdiction of such court, and into the mitigating and aggravating circumstances of the offense of such person, and shall report thereon in writing to such court or judge. * * *."

Section 24-210, R. R. S. Nebraska, 1943:

> "The Judges of the Supreme Court shall during the month of January in each odd-numbered year

revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court, including rules for the advancement of pending cases."

Section 8a. 2. (3) Revised Rules of the Supreme Court of the State of Nebraska, 1967:

"Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

## STATEMENT OF THE CASE

Respondent adds to the matters set forth in Petitioner's Statement of the Case, the fact that in Nebraska, and particularly in Lancaster County, the presentence investigation is a regular and customary procedure. Petitioner was represented by counsel at the time he pleaded guilty, who knew such an investigation and report was being conducted and prepared. Petitioner presented material favorable to himself to be included in the report. No motion was made prior to sentencing for the production or inspection of the report.

The rules of the Nebraska Supreme Court provide that consideration of a cause will be limited to errors assigned and discussed. Contrary to petitioner's allegation and his statement of the case (page 5), no assignment of error was made to the effect that Section 28-401, R. R. S. Neb. 1943 violated the Due Process Clause of the Fourteenth Amendment because it was vague and lacked "rational guidelines" for a decision. This issue was raised for the first time in petitioner's

Motion for Rehearing, after the decision of the Nebraska Supreme Court.

## ARGUMENT

### I.

**The Use By A Trial Judge of A Presentence Report in Fixing the Sentence of One Convicted of A Felony Does Not Violate the Due Process Clause of the Fourteenth Amendment, Even Though It May Contain Information Which Would Not Be Admissible in A Trial on the Merits, and the Defendant Is Not Afforded An Opportunity to Cross-Examine Witnesses nor Present Rebuttal Evidence.**

That petitioner was not surprised that a presentence report was being prepared is apparent. He even submitted material to be included in it. The use of a presentencing report, prepared as authorized by Section 29-2215, R. R. S. Neb. 1943, is standard procedure in Lancaster County, Nebraska. We do not have a copy of the record in this court, and the original is not available to us, but we believe that no request was made for an inspection of the report before sentencing, and that no objection was made when it was offered in evidence. No motion for leave to rebut any of the facts contained in the report was made before, at, or after sentencing.

Petitioner, on page 7 of his brief, states that he need not quarrel with the results in *Williams* v. *New York*, 337 U. S. 241, 93 L. Ed. 1337 (1949), to assert that the use of the presentence report denied him due process. If this is true, we must confess that petitioner can see a finer distinction than we can, because we are completely unable to distinguish *Williams* from

the case under consideration herein. This court, in *Williams*, said:

"* * * * *

"To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

"* * * * *"

*Williams* has been followed in numerous cases since 1949, including *Williams* v. *Oklahoma*, 358 U. S. 576, 3 L. Ed. 2d 516, 79 S. Ct. 421 (1959). As recently as 1967, in *Specht* v. *Patterson*, 386 U. S. 605, 18 L. Ed. 2d 326, 87 S. Ct. 1209, this court distinguished, but adhered to *Williams* v. *New York*.

Petitioner complains that the report contains matters which are prejudicial to him, and which he had no opportunity to rebut. Undoubtedly the same situation prevailed in *Williams* v. *New York*, and the entire thrust of *Williams* is that this fact did not constitute a violation of due process. Furthermore, at least as to some of the matters complained of, petitioner's version was included in the report. What weight, if any, was to be given to conflicting stories was a matter to be resolved by the judge.

There is, of course, no evidence whatever that the judge relied upon the matters petitioner complains of in fixing the sentence. The evidence of the crime itself, even assuming the accuracy of petitioner's account of it, is certainly enough to justify the court in imposing the death sentence. Petitioner, by his own account entered the home of the young mother of two children, raped her, robbed her, and deliberately murdered her by tying a cord around her neck. No other evidence should be necessary to convince a court that he was a depraved, vicious and extremely dangerous individual—even if his previous record had been spotless.

II.

**Discretionary Authority in A Trial Judge to Set Sentences Within Minimum and Maximum Limits Does Not Violate the Due Process Clause of the Fourteenth Amendment Due to Vagueness.**

Petitioner, in support of his second proposition of law, cites numerous cases, none of which seem to be in point. Not one suggests that a statute authorizing a judge, within prescribed limitations, to determine the sentence, without specifying the basis upon which he shall make the determination, is violative of due process. We suggest that no such decisions exist.

In the case of *Williams* v. *New York*, 337 U. S. 241, 93 L. Ed. 1337, previously cited herein, this court specifically recognized that wide discretion was vested in a sentencing judge as to the types and sources of information to be used in fixing sentences, and that this discretion is increasing, saying:

"* * * * *

"Modern changes in the treatment of offenders make it more necessary now than a century ago

> for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. * * *.
>
> "* * * * * *"

It is extremely doubtful that it would be possible to devise standards of sentencing that would be practical in view of the myriad considerations involved. No two individuals are alike, and an attempt to specify which particular factors of previous criminal records, intelligence, age, family background, heinousness of the crime, prospects of reformation, danger to the community, etc. should be given what weight in arriving at what sentence would be an exercise in futility.

Furthermore, we point out that the slightest exploration in that field by this court would open up Pandora's box, not to mention prison gates all over the country. We have no specific information about other states, but any intimation by this court that discretion in sentencing by a trial judge, in the absence of specific statutory guidelines, violated due process for vagueness would free all of the prisoners in Nebraska who are not serving the minimum sentences authorized by statute.

We further point out that Section 8a. 2. (3) of the Rules of the Nebraska Supreme Court, authorized by Section 24-210, R. R. S. Neb. 1943, provides:

> "Assignments of error relied upon for reversal and intended to be urged in the brief shall be sparately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

An examination of appellant's brief in the case of *State* v. *Alvarez* in the Supreme Court of Nebraska shows that none of the assignments of error listed on pages two and three of the brief makes the contention that Section 28-401 is violative of due process for vagueness. We therefore submit that petitioner had not raised the question in the manner required by Nebraska procedural rules.

III.

**The Death Penalty Is Not A Cruel and Unusual Punishment, in Violation of the Eighth and Fourteenth Amendments.**

Petitioner suggests that the death penalty is cruel because it is, these days, rarely inflicted. We are unable to follow this argument, unless it be on the theory that misery loves company, and that a convicted murderer suffers less awaiting execution if he knows many others will also be executed. This argument appears to be a non sequitur.

This court has, through the years, frequently upheld the death penalty, and has specifically held it not to be cruel and unusual punishment. In *Louisiana* v. *Resweber*, 329 U.S. 459, 91 L. Ed. 422, the court said:

> "* * * * *
>
> "* * *, The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. * * *.
>
> "* * * * * *"

Petitioner in the third and fourth sections of his argument, inveighs against the death penalty, as unnecessary, ineffective, and cruel. He says, "Life is a funda-

mental right," and "Existence is a prerequisite to the exercise of any rights." We suspect that Mary O'Shea would have agreed, and certainly her children and husband would agree. Petitioner deliberately, wantonly, brutally, senselessly deprived her of her life, with no excuse or provocation whatever. Nebraska has said that in that situation the murderer's life may be forfeited. The propriety of such a possible sentence is a decision for the Nebraska Legislature, and not for this court, or for any court.

No one could seriously contend that the framers of the Constitution intended to prohibit capital punishment. It was a common and accepted form of punishment at the time of the adoption of the Constitution and of the Fourteenth Amendment. Petitioner now asks this court, at this late date, to suddenly "discover" that the Fourteenth Amendment prohibits the death penalty. What he is asking for is judicial legislation of the most blatant sort. We believe the court in *Jackson* v. *Dickson*, 325 F. 2d 573, cert. den. 84 S. Ct. 1637, 377 U. S. 957, 12 L. Ed. 2d 501, expressed the proper approach to this matter, saying:

"* * * * *.

"Here there is no suggestion, as there was in certain of the cases above cited, that the method of administering the penalty is cruel or unusual. The contention is only that the penalty itself is of that character. This contention, in the light of the foregoing authorities, we must reject. *Jackson's arguments, which attack the penalty as incompatible with modern concepts of justice, would more properly be addressed to the California legislature. It is not for us to write our personal views on the matter, whatever they may be, into the Constitution.* * * *.

"* * * * *." (Emphasis supplied)

We submit that the question of the abolition of capital punishment is a legislative, not a judicial one, and the right to resolve that question, so far as it pertains to Nebraska convictions, is vested solely in the Nebraska Legislature. Petitioner is asking this court to usurp this legislative function because, he hopes, the majority of this court is opposed to the death penalty. We are confident that the court will refuse to do so.

## CONCLUSION

We therefore submit that no substantial federal constitutional question is involved, and that certiorari should be denied.

Respectfully submitted,

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